MICHIGAN SUPREME COURT

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WHETHER PARENTS CAN WAIVE CHILDREN'S LEGAL CLAIMS AT ISSUE IN OCTOBER 28 ORAL ARGUMENT BEFORE MICHIGAN SUPREME COURT; HEARING TO BE HELD AT COOLEY LAW SCHOOL AUBURN HILLS CAMPUS
Pontiac High School students will attend, study case with help from local judges and lawyers; oral argument to be simulcast to Cooley campuses in Lansing and Grand Rapids for local high school students' viewing

LANSING, MI, October 22, 2009 – Parents often sign releases agreeing to give up their child's right to sue if the child is injured on a school trip or while participating in sports. But are such waivers legally valid? That's the question that the Michigan Supreme Court will consider when it hears oral arguments in *Woodman v Kera* on October 28, at the Auburn Hills campus of Thomas M. Cooley Law School.

The plaintiff in *Woodman* rented an indoor play arena, "Bounce Party," for her five-year-old son's birthday party. On the day of the party, the boy's father signed a release on his son's behalf; the release stated that the child was giving up claims against Bounce Party in case he was injured. The boy jumped off the top of a slide, breaking his leg, and his mother sued the facility's owners on her son's behalf. A trial court judge found that the release was valid and dismissed the plaintiff's negligence claim while allowing other claims to go forward, but the Court of Appeals reversed. In Michigan, as a general rule, a parent has no authority to waive or release his or her child's rights, the Court of Appeals said; while Michigan may have statutory exceptions to this common law rule, "nothing has been discovered in the current statutory scheme, which would permit a parent to release the property rights of their child in the circumstances comprising this litigation." The appellate court noted that its ruling had "significant and far-reaching implications … [for] organizations and businesses providing valuable services and activities for minor children," but said that the court had "no alternative but to recognize the current status of our law and follow its precepts." The Supreme Court has directed the parties to address "whether the parental pre-injury liability waiver was valid and enforceable."

While the Court normally hears oral argument at the Hall of Justice in Lansing, this will be the fifth time the Court has heard cases off-site as part of its "Court Community Connections"

program, aimed principally at high school students to help them have a better understanding of Michigan's judicial branch.

Students from Pontiac High School will attend the 1 p.m. session at the Auburn Hills campus, which will be simulcast to Cooley Law School campuses in Lansing and Grand Rapids. Students from Eastern High and Seventh Day Adventist schools in Lansing and East Kentwood High School in Grand Rapids will view the simulcast.

Details about the case will be shared with students and teachers in advance of oral argument. After discussing the case with legal professionals, students will have front-row seats either in person or by simulcast technology to off-site campuses. Following the argument, the Pontiac students will meet with attorneys in the case for a debriefing. Students in Lansing and Grand Rapids will view the debriefing via simulcast and participate in discussions led by Cooley law professors.

"This real-life educational opportunity for students is being sponsored by many groups," said Chief Justice Marilyn Kelly. "The Court thanks Thomas M. Cooley Law School; the Oakland County, Ingham County, Grand Rapids, and D. Augustus Straker bar associations; the Association of Black Judges of Michigan; and attorneys Scott L. Feuer and Paul A. McCarthy who are arguing the case and debriefing students."

John Nussbaumer, dean of Cooley's Auburn Hills campus, said the *Woodman* case is particularly appropriate for a student audience. "This case presents us with the important question of the scope of a parent's authority over a child," he said. "Both the trial court and the Court of Appeals acknowledged the practical problems that would likely follow from a ruling that parental waivers are not legally valid. On the other hand, courts are bound to follow the law. So this case has at its core an even more basic issue: should courts base their decisions on the law only, or should they take into account the impact that their rulings will have on society? This case gives students a valuable opportunity to confront that question."

Please note: *The summary that follows is a brief account of the case and may not reflect the way in which some or all of the Court's seven Justices view the case. The attorneys may also disagree about the facts, the issues, the procedural history, or the significance of the case. Briefs are available on the Supreme Court's "One Court of Justice" web site at http: www.courts.michigan.gov/supremecourt/Clerk/MSC_orals.htm. For further details about the case, please contact the attorneys.*

WOODMAN v KERA, L.L.C. (case no. 137347)
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Attorney for defendant Kera, L.L.C., d/b/a Bounce Party: Scott L. Feuer/(248) 723-7828
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Trial court: Kent County Circuit Court
At issue: A five-year-old boy broke his leg when he jumped off a slide at a play facility that his parents had rented for his birthday party. Before the party, the boy's father signed a release

provided by the play facility. The release stated in part that, by signing the release, the parent was waiving claims against the play facility for "personal injury, property damage or wrongful death caused by participation in this activity." Is the pre-injury waiver valid and enforceable? Can parents waive their children's potential legal claims against a business, school, community group, or other organization that provides children's activities?

Background: Sheila Woodman rented "Bounce Party" – an indoor inflatable play facility owned by Kera, L.L.C., a Michigan corporation – for her son Trent's fifth birthday party. Bounce Party provided invitations for Ms. Woodman to send to the party guests' families. The invitation included a release for each child's parent or legal guardian to sign. The release read in part:

> THE UNDERSIGNED, by his/her signature herein affixed does acknowledge that any physical activities involve some element of personal risk and that, accordingly, in consideration for the undersigned waiving his/her claim against BOUNCE PARTY, and their agents, the undersigned will be allowed to participate in any of the physical activities.
>
> By engaging in this activity, the undersigned acknowledges that he/she assumes the element of inherent risk, in consideration for being allowed to engage in the activity, agrees to indemnify and hold BOUNCE PARTY, and their agents, harmless from any liability for personal injury, property damage or wrongful death caused by participation in this activity. Further, the undersigned agrees to indemnify and hold BOUNCE PARTY, and their agents, harmless from any and all costs incurred including, but not limited to, actual attorney's fees that BOUNCE PARTY, and their agents, may suffer by an action or claim brought against it by anyone as a result of the undersigned's use of such facility.

On the day of the party, Trent's father, Jeffrey Woodman, signed the release on Trent's behalf. At the beginning of the party, a Bounce Party employee gave the standard "safety talk," in which the employee told the guests that no one should jump from the top of the slide. There were also written rules posted on the slide and on the wall, instructing guests not to jump from the slide. After going down the slide about four times, Trent jumped from the top of it and broke his leg.

Ms. Woodman sued Bounce Party as Trent's next friend; her complaint included claims of gross negligence, negligence, and violations of the Michigan Consumer Protection Act (MCPA), MCL 445.901, *et seq*. In particular, Ms. Woodman alleged that Bounce Party knowingly failed to provide supervision of the children, ignored the slide's manufacturer's safety instructions, failed to equip the slide with available safety devices, and failed to properly monitor the slide. The lawsuit was filed in Kent County Circuit Court.

In its answer to her complaint, Bounce Party noted that Mr. Woodman had signed a release on Trent's behalf and asserted the release as a defense against Ms. Woodman's lawsuit. After a period of discovery, which included taking the depositions of the Woodmans, Bounce Party asked the circuit court to dismiss the lawsuit. Bounce Party argued that

- all of Trent's potential claims against Bounce Party were waived by the release Mr. Woodman signed;

- the Woodmans could not prove that Bounce Party was grossly negligent;
- the dangers of jumping from the top of the slide were open and obvious;
- Bounce Party had no duty to supervise Trent because his parents were present at the party; and
- the MCPA claims should be dismissed.

Ms. Woodman also moved for summary disposition, arguing that the release was invalid as a matter of law because a parent may not waive, release, or compromise claims by or against her child.

The circuit court judge held two hearings on the parties' motions. During one of the hearings, the judge expressed his concerns about the practical implications of the Woodmans' argument that parental releases are invalid. The judge suggested that if he ruled in the Woodmans' favor on this issue, he would "have every school superintendent in the county and the superintendent of all the parochial schools in this county and every other organization banging on [the judge's] desk and hollering and shouting, and then the next thing that's going to happen is all school sporting events will be at an end and all school field trips will be at an end, and we'll all be hermetically sealed up in our houses with our children."

Ultimately, the judge found that the release was valid, and he dismissed the ordinary negligence claim against Bounce Party. By signing the release, Mr. Woodman had waived any claims Trent might have had for ordinary negligence, the judge concluded. A jury would need to determine whether Bounce Party had been grossly negligent, the judge said. He rejected Bounce Party's argument that it had no duty to supervise and also held that the open and obvious doctrine did not apply to the case. Although the judge tentatively agreed with Bounce Party that the MCPA did not apply, he declined at that time to dismiss those claims.

In a published opinion, the Court of Appeals reversed and remanded the case to the circuit court, holding that the Woodmans' negligence claim must be reinstated. Under Michigan common law, a parent may not waive or release claims by or against his or her child, the three-judge panel held. The judge who wrote the opinion for the panel noted that parents have an inherent and fundamental right to make decisions about the care, custody, and control of their children until the children become adults under the law. But the state has an interest in protecting children that can sometimes conflict with a parent's authority, the judge said. Some states, such as Colorado and Florida, "have used these precepts regarding the dominance of parental authority to validate pre-injury waivers to preclude liability," the judge wrote, while other states, such as New Jersey, have invalidated the agreements on the basis of "wider public policy concerns and the *parens patriae* duty to protect the best interests of children." Some states allow parental waivers for some purposes – medical care, insurance, or participation in school or community activities – but not others, he explained. In addition, some states uphold waivers if they involve public, nonprofit, or voluntary organizations.

The judge also discussed Michigan court decisions. In Michigan, as a general rule, a parent has no authority to waive or release his or her child's rights, he noted. And while Michigan may have statutory exceptions to this common law rule, "nothing has been discovered

in the current statutory scheme, which would permit a parent to release the property rights of their child in the circumstances comprising this litigation. [I]n the absence of a clear or specific legislative directive, we can neither judicially assume nor construct exceptions to the common law extending or granting the authority to parents to bind their children to exculpatory agreements. Thus, the designation or imposition of any waiver exceptions is solely within the purview of the Legislature." The court was aware that different public policies might support waivers in some circumstances, but, in the absence of legislation, the court was "precluded from defining or implementing any such divergence from the common-law preclusion regarding the validity of any form of waiver by a parent on behalf of their minor child," the judge wrote. He added, "While this ruling has significant and far-reaching implications regarding practices routinely engaged in by organizations and businesses providing valuable services and activities for minor children and has the potential to increase litigation and affect the availability of programs to younger members of the community, I have no alternative but to recognize the current status of our law and follow its precepts."

The other two judges wrote opinions concurring in the ruling, but they too expressed concern about the impact of the decision. One of the judges said that the court's decision would have "far-reaching implications" because entities that provide educational, recreational, and entertainment opportunities for minors will now "do so at great risk of having to defend an expensive lawsuit, meritorious or not." He said that the Supreme Court or the Legislature should take up the issue. The other judge noted that many youth activities "run and operate on release and waiver of liability forms for minor children," and stated that the Legislature would have to act in this area.

As to the remaining issues, the Court of Appeals held that the circuit court erred by not dismissing the Woodmans' gross negligence and MCPA claims against Bounce Party. The Court of Appeals agreed with the circuit court that the open and obvious doctrine did not apply and that Bounce Party had a duty to protect the party invitees from dangerous conditions.

Both parties appealed to the Michigan Supreme Court on various issues, with Bounce Party appealing the Court of Appeals ruling on the waiver issue. In granting leave to appeal, the Supreme Court instructed the parties to address only the issue of "whether the parental pre-injury liability waiver was valid and enforceable."

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